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2 curiae, Tennessee, et al., in support of the
3 Respondents.

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P R O C E E D I N G S

[10:02 a.m.]

CHIEF JUSTICE ROBERTS: We'll hear argument first in United States versus Georgia, and Goodman versus Georgia.

General Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF PETITIONER IN 04-1203

GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:

Title II of the Americans with Disabilities Act validly abrogates the States' sovereign immunities as applied to the class of cases involving the unconstitutional treatment of disabled inmates. That result follows from this Court's decisions in Nevada against Hibbs, and Tennessee against Lane.

In Lane, this Court held that it was clear, beyond peradventure, that Congress had an adequate basis to enact prophylactic legislation to ensure that individuals with disabilities had access to public services. In reaching that conclusion, this Court surveyed a broad array of evidence, not just limited to the court-access context, and, indeed, surveyed evidence involving prisons, in particular. As a result, the sole remaining question, and the only

1 question in Lane on which this Court applied an as-
2 applied analysis, is the question of whether or not
3 Title II's remedies are congruent and proportional as
4 applied to the particular context; here, the context of
5 the discriminatory, inhumane, or otherwise
6 unconstitutional treatment of inmates with
7 disabilities.

8 Now, if one applies the congruence and
9 proportionality analysis of Lane, in particular, in the
10 prison context, it easily passes constitutional muster.

11 For all of the factors that this Court emphasized as
12 making Title II appropriate in the court-access context
13 -- the absence of absolute mandates, the inherent
14 flexibility of the reasonable modification standard,
15 the fact that benefits are limited to otherwise
16 eligible individuals, the defenses for fundamental
17 alterations or undue burdens -- all of those factors
18 apply with full force in this context.

19 JUSTICE O'CONNOR: Can it -- with respect to
20 the reasonableness aspect, in Turner versus Safley, we
21 said prison administrators have a good deal of
22 latitude, in the prison context, in order to maintain
23 order. Now, do you see the reasonableness requirements
24 of the Disabilities Act as being congruent with the
25 Turner-Safley reasonableness analysis?

1 prophylaxis at all with respect to Title II, but I
2 think it is proportional and congruent, and I think the
3 prophylactic gap between what the Constitution protects
4 and what Title II protects is relatively narrow in the
5 prison context, both because if you think about one set
6 of claims, the Turner claims, much of that deference
7 can be brought in under the reasonable-modification
8 standard; and then, if you think of the other class of
9 cases, those involving deliberate indifference, I think
10 in those class of cases, this is -- the prison context
11 is one of the rare contexts in which the State is under
12 an affirmative obligation to provide accommodations to
13 the medical needs of inmates, including disabled
14 inmates. And I think the fact that here's a case where
15 the Constitution requires affirmative accommodation
16 also helps narrow the prophylactic gap.

17 CHIEF JUSTICE ROBERTS: Under Turner, one of
18 the considerations that can be taken into account are
19 the budgetary limitations of State officials. Does
20 that apply under the ADA, as well?

21 GENERAL CLEMENT: I think it certainly could.
22 I think -- if you look at the cases that we collect at
23 footnote 17 of our reply brief, which are cases where
24 the lower courts have applied Turner-style deference to
25 claims under the Rehabilitation Act or under Title II,

1 I think some of those Courts of Appeals have clearly
2 taken into account those kind of budgetary concerns.

3 JUSTICE KENNEDY: Of course, all of the
4 concerns you've mentioned could be taken care of by
5 injunctive relief. You don't necessarily need damages.

6 GENERAL CLEMENT: Well, I think damages are
7 an important aspect of the remedial scheme, Justice
8 Kennedy. I would also point out that, because a number
9 of States have challenged the application of Title II,
10 in the prison context, in particular, as not being
11 valid Commerce Clause legislation, it's not a foregone
12 conclusion that there would be injunctive relief
13 available. But I do think if we want to focus on the
14 damage --

15 JUSTICE KENNEDY: Well, but if we held the
16 Act was applicable for injunctive relief, it would --
17 it would be, because I'm -- the pert part of your
18 argument is that you could have a attorneys fees and
19 triple damages where trial attorneys levy against the
20 State treasury, which is -- which is what the Eleventh
21 Amendment is largely concerned with. That -- all of
22 that would follow from what you've said so far.

23 GENERAL CLEMENT: Well, I'm not sure about
24 the treble damages, but certainly compensatory damages
25 would be available. This Court, of course, in Barnes

1 against Gorman, has already said that punitive damages
2 are not available under Title II. And I think if you
3 look at compensatory damages --

4 JUSTICE KENNEDY: I know they're not
5 available under Title II, but, I mean, as a
6 constitutional matter, there's certainly nothing
7 barring them, based on what you've told us so far.

8 GENERAL CLEMENT: Well, I think punitive
9 damages would be a harder case, in terms of
10 proportional incongruence. But this Court has, even in
11 the absence of congressional action, found damages to
12 be an appropriate remedy for unconstitutional or
13 unlawful State conduct. Take the Bivens cases, for
14 example, or the Franklin case, in Title IX, and, I
15 think, if damages are appropriate where Congress hasn't
16 acted, I think where Congress has provided for damages,
17 damages are clearly an appropriate remedy. But, with
18 respect to damages, in particular, I think it's
19 important to note that the prophylactic gap here is not
20 large, because, in the Title IX context, in the Gebser
21 case, this Court has already said that, in order for
22 there to be compensatory damages, there needs to be a
23 showing of deliberate indifference. And now, there may
24 be some difference between what "deliberate
25 indifference" means under Gebser and what "deliberate

1 indifference" means under Farmer against Brennan, but,
2 whatever that small gap is, that certainly seems
3 manageable.

4 JUSTICE GINSBURG: General Clement, in two
5 respects, it -- I think you have addressed the cost
6 concern by comparing, in your brief, the Federal
7 experience, which is subject to these controls, and you
8 said it wasn't an inordinate expense, but you also
9 pointed out that every State prison system is subject
10 to the Rehabilitation Act, because they get Federal
11 funds. Is there a difference between the obligation
12 that State systems would have under the Rehabilitation
13 Act and under the ADA?

14 GENERAL CLEMENT: No, Justice Ginsburg, we
15 don't think so. But one thing I think it's important
16 to emphasize is that, although at the current time
17 period all 50 States take Federal funds for their
18 prisons, so that all 50 States are subject to the
19 Rehabilitation Act, that wasn't true at the time that
20 the ADA was passed. And I think what that illustrates
21 is both that Title II plays an important gap-filling
22 role and also that, for whatever reason, I think, this
23 is an area -- prisons taking Federal funds -- where the
24 degree to which they take Federal funds may wax and
25 wane over time. And so, I don't think this is a

1 situation where Title II is purely duplicative of the
2 Rehabilitation Act, but the difference is really in
3 terms of the scope of the coverage, not in terms of the
4 substantive obligations under the --

5 JUSTICE GINSBURG: And the --

6 GENERAL CLEMENT: -- two provisions.

7 JUSTICE GINSBURG: -- damage remedies
8 available under the Rehabilitation Act is --

9 GENERAL CLEMENT: I'm --

10 JUSTICE GINSBURG: Damages are available?

11 GENERAL CLEMENT: Yes, they are, as to the
12 States.

13 JUSTICE SCALIA: General --

14 JUSTICE O'CONNOR: But this --

15 JUSTICE SCALIA: -- Clement, I'm interested
16 in another statute that has applicability in the
17 circumstances, and that's Section 1983 and the Prison
18 Litigation Reform Act. Under the -- under the Prison
19 Litigation Reform Act, if you're bringing a
20 constitutional claim under Section 1983, you have to
21 exhaust your prison remedies before you can do that.
22 And that is not the case here, is that right?

23 GENERAL CLEMENT: No, I don't think that is
24 right, Justice Scalia. I think that we would -- we
25 would say that the PLRA fully applies to claims under

1 Title II and there is an exhaustion remedy. There is
2 also, of course, an exhaustion remedy inherent in Title
3 II, because, in order to get a reasonable modification,
4 you have to ask for the modification in the first
5 place.

6 We also think that the PLRA applies, in all
7 its provisions, to Title II claims. And one important
8 provision to keep in mind is 1997e(e) -- 42 U.S.C. 1997
9 e(e) -- which is a limitations on the damages that are
10 available. And, under that provision, in order to get
11 damages for emotional or mental injury, you have to
12 also show some sort of physical injury. And the lower
13 courts have interpreted that to require at least the
14 kind of more than de minimis injury you need under the
15 Eighth Amendment. And I think the PLRA, together with
16 Title II, in the particular area of damages, which is
17 what Justice Kennedy has pointed out is the particular
18 area of concern under the Eleventh Amendment, is even a
19 further narrowing of the relief that's available and a
20 further narrowing of the prophylaxis under the Title
21 II. So, I do think the PLRA is actually something that
22 actually helps make sure that the remedy here is
23 congruent and proportional. JUSTICE STEVENS:
24 May I ask you to comment on this? This problem of --
25 just troubles me a little bit. If we hold this

1 provision unconstitutional because it is not congruent
2 and proportional and so forth, does it not follow that
3 the Title II is entirely unconstitutional, it cannot
4 even be enforced by injunctive relief?

5 GENERAL CLEMENT: Because of the lack of the
6 Commerce Clause nexus? Is that the --

7 JUSTICE STEVENS: Well, it --

8 GENERAL CLEMENT: -- concern, Justice
9 Stevens?

10 JUSTICE STEVENS: -- the whole basis for the
11 constitutionality of the statute, I think, is the
12 Enforcement Clause of the Fourteenth Amendment.

13 GENERAL CLEMENT: Well, it was -- when it was
14 originally enacted, Justice Stevens, it was supported
15 by both the Commerce Clause and, of course the --

16 JUSTICE STEVENS: That's true of Title II, as
17 well as Title I?

18 GENERAL CLEMENT: That is -- that's true, the
19 statute generally -- and it's true of Title II. We
20 would make -- we would certainly defend the Act as
21 valid Commerce Clause legislation. But I do think that
22 is a much more difficult argument as to Title II,
23 generally, and particularly difficult argument with
24 respect to prisons. I think, in that respect, it's --

25 JUSTICE STEVENS: Right.

1 GENERAL CLEMENT: -- telling that, if you go
2 back to the Government's brief in Yeskey, when we were
3 dealing with constitutional challenges to the
4 application of Title II to prisons, the Government
5 focused all its energy on defending it as valid Section
6 5 legislation --

7 JUSTICE STEVENS: Right.

8 GENERAL CLEMENT: -- and dealt with the
9 Commerce Clause in a footnote. So, I think we
10 certainly, at that point, were of the view that the
11 Section 5 authority was the much stronger basis to
12 defend the statute, especially in the prison context.

13 JUSTICE STEVENS: So, what I'm suggesting is
14 that it is not merely a matter of damages that's at
15 issue here, but the entire validity of Title II.

16 GENERAL CLEMENT: We agree with that, Justice
17 Stevens. And I would say, with respect to -- I mean,
18 again, I don't want to mislead you, in the sense that
19 we would be here defending it as Commerce Clause
20 legislation, but I think that's a tricky argument.

21 If it's possible, I'd like to reserve the
22 rest of my time for rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, General.

24 Mr. Bagenstos.

25 ORAL ARGUMENT OF SAMUEL R. BAGENSTOS

1 ON BEHALF OF PETITIONER IN 04-1236

2 MR. BAGENSTOS: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 The Americans with Disabilities Act is
5 congruent and proportional as applied to the prison
6 setting for essentially three reasons. The first is
7 the nature of the constitutional right that's at stake
8 in the prison setting. As in the access-to-courts
9 setting, this is a setting where States have
10 affirmative constitutional duties, including, in many
11 circumstances, duties of accommodation of inmates'
12 disabilities.

13 The second reason relates to the record of
14 constitutional violations in this context, a record in
15 the context of State treatment of inmates with
16 disabilities that is extensive, that is judicially
17 documented and confirmed on a nationwide basis.

18 And the third reason relates to the tailoring
19 of the ADA remedy, which the -- which General Clement
20 has spoken about to some extent already -- both
21 limitations inherent in the ADA itself and in the PLRA,
22 which fully applies to ADA cases.

23 JUSTICE SCALIA: Do those violations that you
24 allude to -- is there an extensive record of violations
25 by the State of Georgia?

1 MR. BAGENSTOS: There is not. The same --
2 the record of constitutional violations is nationwide.
3 We don't have any judicial findings --
4 JUSTICE SCALIA: Well, you're --
5 MR. BAGENSTOS: -- of constitutional
6 violations --
7 JUSTICE SCALIA: But the money --
8 MR. BAGENSTOS: -- by Georgia.
9 JUSTICE SCALIA: -- is not coming from the
10 Nation, it's coming from the State of Georgia. Was the
11 State of Georgia guilty of constitutional violations?
12 MR. BAGENSTOS: Well, I mean, of course, in
13 this case, the lower court said that there might have
14 been a constitutional violation that allowed that claim
15 to proceed in the --
16 JUSTICE SCALIA: No, no, my --
17 MR. BAGENSTOS: -- companion --
18 JUSTICE SCALIA: -- I mean a record -- a
19 record that would have justified applying, against the
20 State of Georgia, prophylactic measures.
21 MR. BAGENSTOS: Well, we think the
22 prophylactic measures are justified by the nationwide
23 record, just as in this Court's case --
24 JUSTICE SCALIA: Even against people who
25 played no part in that nationwide record.

1 MR. BAGENSTOS: Well, that's this Court's
2 cases on prophylactic nationwide legislation,
3 absolutely. You know, in Tennessee versus Lane, this
4 Court upheld nationwide prophylactic legislation on the
5 basis of a record that included constitutional
6 violations in only eight States. Here, we have a
7 record that touches on at least 37 States, if you look
8 in pages 20 to 36 of our opening brief. In --

9 JUSTICE BREYER: This is -- it's relevant to
10 the -- I just saw these as -- I -- just by chance, it -
11 - one of the cases in the SG's brief involved Georgia
12 juvenile facilities, where mentally ill patients were
13 restrained, hit, shackled, put in restraint chairs for
14 hours, sprayed with pepper spray.

15 MR. BAGENSTOS: Well, I think --

16 JUSTICE BREYER: And that seemed to be one
17 instance coming out of Georgia.

18 MR. BAGENSTOS: I think that's right. I
19 think that's --

20 JUSTICE SCALIA: But was that before or after
21 the enactment of this statute?

22 MR. BAGENSTOS: I believe that was pre-ADA,
23 Your Honor.

24 JUSTICE SCALIA: Yes.

25 MR. BAGENSTOS: But I think that the point --

1 the point is that the record of constitutional
2 violations here is a nationwide record. It's a record
3 that includes some incidents from Georgia. It's a
4 record that includes many incidents from many other
5 States; as I say, 37 different States. It's a record
6 of constitutional violations that's been judicially
7 confirmed. We have courts actually finding --

8 JUSTICE SCALIA: Well --

9 MR. BAGENSTOS: -- in final adjudications --

10 JUSTICE SCALIA: -- I'm looking at the --

11 MR. BAGENSTOS: -- constitutional violations.

12 JUSTICE SCALIA: -- at the chart in one of
13 the amicus briefs, which shows that there are, for
14 Georgia -- and it lists all the States -- for Georgia,
15 zero arguable State violations prior to the Act.

16 MR. BAGENSTOS: Well, I think that's -- I
17 mean, I think that's because they exclude --

18 JUSTICE SCALIA: The --

19 MR. BAGENSTOS: -- juvenile facilities from
20 their --

21 JUSTICE SCALIA: Well --

22 MR. BAGENSTOS: -- consideration.

23 JUSTICE SCALIA: -- State and local
24 violations.

25 MR. BAGENSTOS: Right.

1 JUSTICE SCALIA: But State and local units
2 don't enjoy the sovereign immunity of the State.

3 MR. BAGENSTOS: The -- I mean --

4 JUSTICE SCALIA: You --

5 MR. BAGENSTOS: -- you know --

6 JUSTICE SCALIA: -- don't need this Act to
7 sue them.

8 MR. BAGENSTOS: Well, I would say, in
9 Georgia, of course, State and -- of course, local
10 facilities are arms of the State in Georgia. That's
11 been the judicial holding. And so, for Eleventh
12 Amendment purposes, we would consider them. But I
13 would say the record of constitutional violations here
14 that justifies nationwide prophylaxis is really far
15 more extensive than the record that's been before this
16 Court in Tennessee v. Lane and Nevada v. Hibbs and
17 touches on touches on even more States than, you know,
18 the nationwide literacy test ban that was upheld in
19 Oregon v. Mitchell. At the time this Court upheld
20 that, only 22 States had literacy tests, I think.

21 JUSTICE STEVENS: May I ask you this? The
22 notion of our reviewing the adequacy of the evidence
23 before Congress is something that's always seemed, sort
24 of, puzzling to me. Do you know what -- what is --
25 what standard do you suggest that we should apply in

1 determining whether the evidence before Congress was
2 sufficient?

3 MR. BAGENSTOS: In determining whether the
4 evidence before Congress was sufficient, I think, you
5 know, this Court has said -- I think the standard comes
6 from City of Boerne -- it's the congruence and
7 proportionality test, but it recognizes that Congress
8 has to have a great deal of leeway in determining where
9 the line between enforcement and substantive change in
10 the law lies. And, you know, here we have, whatever
11 standard we use, the kind of record of constitutional
12 violations that justifies prophylaxis. We have -- we
13 have constitutional rights that impose on States
14 obligations of accommodation. So, the ADA is, in no
15 circumstance --

16 JUSTICE STEVENS: Yes, I understand your view
17 is that, whatever the standard is, you win. I'm just
18 curious, do you have a --

19 [Laughter.]

20 JUSTICE STEVENS: -- do you have a
21 formulation of what the proper standard should be?

22 MR. BAGENSTOS: Well, as I said, I think the
23 -- I do think that the proper standard should be the
24 City of Boerne standard of congruence and
25 proportionality, exercised with the kind of deference

1 that this Court said in Boerne, which I think this
2 Court adopted in Lane, to the factfinding capabilities
3 of the -- of the -- of the Congress.

4 CHIEF JUSTICE ROBERTS: I understand your
5 submission -- and that's what I heard from the
6 Solicitor General, as well -- on the difference between
7 enforcement and the substantive right. You're assuring
8 us that we don't need to worry about that, because
9 there's no great difference between what you think is
10 required under the ADA and what's required under the
11 Constitution.

12 MR. BAGENSTOS: Well, Mr. Chief Justice, I
13 think there is clearly a difference. Right? There's a
14 prophylactic sweep to the statute. It's just that it's
15 not very much, in this context, for a number of
16 reasons, one being the nature of the constitutional
17 rights, that they impose requirements that are
18 affirmative duties, the other being the way the
19 reasonableness language of the ADA has been
20 consistently read by lower courts to take account of
21 context, and another being the Prison Litigation Reform
22 Act, which further ties the ADA to the --

23 CHIEF JUSTICE ROBERTS: But I'm just
24 wondering if that's --

25 MR. BAGENSTOS: -- constitutional violation.

1 CHIEF JUSTICE ROBERTS: -- a reasonable
2 reading of the ADA, which I had always understood to be
3 a significant change in -- in terms of what rights are
4 available to the disabled. And it seems to me quite
5 different from Turner against Safley, which talks about
6 the demands of the prison environment and the -- and a
7 high level of deference to prison administrators. Do
8 you think that approach is, in fact, consistent with
9 what Congress had in mind with the ADA?

10 MR. BAGENSTOS: I think that the approach of
11 taking into account the significant State interest in
12 uniform treatment in the prison setting uniquely, yes,
13 is very much consistent with what Congress had in mind,
14 just as this Court, in the Cutter case, you know, read
15 the "compelling State interest" language, much more
16 stringent language about the -- about what the State
17 has to satisfy -- as taking --

18 JUSTICE O'CONNOR: One --

19 MR. BAGENSTOS: -- account of --

20 JUSTICE O'CONNOR: One --

21 MR. BAGENSTOS: -- these concerns.

22 JUSTICE O'CONNOR: One concern is that, in
23 the prison situation, the prison is exerting control
24 over all aspects of the prisoner's daily life. That's
25 very different from just court access, as in Tennessee

1 versus Lane, and it could require very extensive
2 requirements, perhaps. Is that a concern, or should it
3 be, in the "congruence and proportionality"
4 examination?

5 MR. BAGENSTOS: Well, I think there are two
6 sides to that coin. I think, definitely, the scope of
7 the ADA in the prison setting, you know, is important.
8 I think that the lower court's reading of
9 "reasonable," which I think is the -- is the reasonable
10 reading of "reasonable," if I may say so -- is, you
11 know, "reasonable" takes account of context, and
12 "reasonableness" takes account of proportion, as well,
13 the kind of accommodation that may be reasonable, where
14 what's at stake is the ability of an inmate with a
15 disability to go to the bathroom safely, like Mr.
16 Goodman alleges, may be entirely unreasonable, where
17 what's at stake is attending an arts-and-crafts class,
18 or something like that. So, I think that is important,
19 but I think the flip side of the -- of the State's
20 complete control over every aspect of the inmate's
21 environment is, this is one of the few areas of
22 Government where States have affirmative constitutional
23 duties, including --

24 JUSTICE SOUTER: Mr. Bagenstos, on this
25 point, do we have any figures on what -- I guess it's

1 the Rehabilitation Act that applies to the Federal
2 Prisons -- do we have any figures on -- you know, on
3 what that has cost in required accommodations?

4 MR. BAGENSTOS: You know, I don't know the
5 figures for that. Perhaps the Solicitor General can
6 answer as to what the burden has been on the Federal
7 Government. I think, you know, the Solicitor General
8 states in his brief -- in his reply brief, particularly
9 -- that the burden has not been significant, the
10 Government --

11 JUSTICE SOUTER: Yes.

12 MR. BAGENSTOS: -- has not --

13 JUSTICE GINSBURG: It applies -- it applies
14 to State prisons, as well, because of its Spending --

15 JUSTICE SOUTER: Well, yes, that's right.

16 JUSTICE GINSBURG: -- Clause legislation.

17 JUSTICE SOUTER: Yes. That's right.

18 MR. BAGENSTOS: That's true. It does apply
19 to State prisons, as well, Justice Ginsburg. However,
20 we -- you know, we obviously can't be sure that it's
21 always going to cover every State prison. It hasn't,
22 at times, in the past. It might not, at times, in the
23 future.

24 I think, you know, one of the significant
25 aspects of the Rehabilitation Act is -- and I think the

1 amicus brief filed on behalf of Mr. Goodman by the
2 former President George H. W. Bush really emphasizes
3 this -- the ADA was passed based on a firm conclusion
4 by Congress that the Rehabilitation Act had failed,
5 that it hadn't worked. And I think the record of
6 constitutional violations here shows that, that we have
7 such an extensive record of judicially confirmed,
8 judicially established findings of constitutional
9 violations in the prison context, and we have
10 constitutional rights that impose on States the same
11 kinds of requirements, not in all particulars, but in
12 very similar ways, as the ADA does, itself. I think
13 that's where -- that's where the congruence and
14 proportionality really comes in.

15 JUSTICE KENNEDY: Why is it so clear that
16 damages are necessary and that equitable relief
17 shouldn't suffice? It's --

18 MR. BAGENSTOS: Well --

19 JUSTICE KENNEDY: -- it's puzzling -- it's
20 puzzling to me, the notion that trial attorneys and
21 their clients can levy upon the funds in State
22 treasuries under the Eleventh Amendment. Why is it
23 congruent and proportional to allow that?

24 MR. BAGENSTOS: Well, a couple of points
25 about that. I mean, the first is the deterrent

1 function of damages is really essential in this
2 context. I think that's the import of the record of
3 constitutional violations. Section 1983 failed.

4 I think the second point about damages is,
5 they're very limited in the prison context. They're
6 limited by this Court's decision in Barnes, no
7 punitives. They're --

8 JUSTICE KENNEDY: Well, where you say Section
9 1983 failed, the ADA could allow equitable remedies.

10 MR. BAGENSTOS: The ADA could allow equitable
11 remedies, but -- could certainly --

12 JUSTICE KENNEDY: And why --

13 MR. BAGENSTOS: -- allow --

14 JUSTICE KENNEDY: And why shouldn't that --
15 why shouldn't that suffice?

16 MR. BAGENSTOS: Well, I think, you know, this
17 -- something this Court has said repeatedly, that the
18 deterrent function of damages is important -- and here,
19 we have -- we have a very good -- we have very good
20 evidence that we need deterrents in this context. We
21 need deterrents because constitutional violations have
22 continued and continued. But I --

23 JUSTICE SCALIA: Why don't --

24 MR. BAGENSTOS: -- think that --

25 JUSTICE SCALIA: Why don't you need it for

1 1983 violations?

2 MR. BAGENSTOS: But --

3 JUSTICE SCALIA: Constitutional violations.

4 Not just prophylaxis --

5 MR. BAGENSTOS: Well, there --

6 JUSTICE SCALIA: -- but actual constitutional
7 violations by the prisons under 1983 --

8 MR. BAGENSTOS: I think it --

9 JUSTICE SCALIA: -- that don't happen to
10 relate to the handicapped and, thus, are not covered by
11 this legislation. You can't get damages there.

12 MR. BAGENSTOS: Well, you know, I think that
13 the -- with respect to constitutional violations that
14 might not relate to people with disabilities, you know,
15 that's something Congress could certainly consider in
16 other legislation. Here, Congress would -- have,
17 staring in front them -- right? -- a record of
18 constitutional violations that showed -- right? --
19 proven constitutional violations showed that the 1983
20 remedy, which doesn't authorize damages against the
21 State, wasn't working. We need to have some additional
22 remedy. We need some additional deterrents and spur to
23 compliance on the part of States. But I think it's
24 also important to note how limited the damages remedy
25 in this context is. It's not just the absence of

1 punitive damages. It's not just -- you know, we also
2 have the provision of the PLRA that says no damages for
3 mental and emotional injury in the absence of physical
4 injury, which means that, in the kinds of cases that
5 are peripheral to core constitutional rights, we're not
6 going to have damages anyway. It also -- we also have
7 the exhaustion requirement of the PLRA, which imposes
8 on plaintiff the requirement that they go to the prison
9 and tell them, "Here's the problem," which means that
10 if we have a case that satisfies the PLRA, we're very
11 likely to have deliberate indifference, a problem that
12 prison officials have refused to resolve --

13 JUSTICE SCALIA: Well, wait, but -- you know,
14 in 1983, when you exhaust your prison remedies, the
15 prison fixes what was wrong, and that's the end of it.

16 But, under this Act, you go through your prison
17 remedies, what do you ask the prison for? Money? The
18 prison can't give you money, so they say, "No, you
19 can't get your money." I --

20 MR. BAGENSTOS: Well, I think --

21 JUSTICE SCALIA: -- mean, the prison-remedy
22 thing is -- the only thing it does is make it take a
23 longer time to get to court, but it does the prison no
24 good. It's going to be liable for damages anyway.

25 MR. BAGENSTOS: Well, I think that, of

1 course, the prison can reduce its damages liability,
2 and, of course, where we have a continuing violation
3 after exhaustion, which is what -- when people file
4 these lawsuits, when they have continuing problems,
5 like Mr. Goodman alleges were continuing problems in
6 his case -- we will have cases where we have very much
7 -- very likely to have deliberate indifference. And
8 so, I think that's an important thing, too.

9 I think the other important point about
10 Turner v. Safley that the Solicitor General spoke about
11 -- right? -- many of the constitutional rights in the
12 prison setting that are significant here don't
13 implicate Turner v. Safley. Eighth Amendment cruel-
14 and-unusual-punishment claims don't implicate Turner v.
15 Safley, as this Court said in the Johnson case. And we
16 have a very substantial record of Eighth Amendment
17 violations. Of course, the Eighth Amendment requires
18 accommodation of serious medical needs, as this Court
19 has said ever since Estelle v. Gamble, and "serious
20 medical means -- needs" is a term that's very close to
21 the way this Court has narrowly read the disability
22 definition in the ADA. And so, I think another very
23 significant aspect of the congruence and
24 proportionality here is how close the ADA's disability
25 definition is to the class of people who implicate

1 constitutional rights, affirmative constitutional
2 rights of accommodation, under the Eighth Amendment
3 itself. And so, I think that's another very
4 significant aspect of the tightness of the fit here.

5 But, here, I think the most salient fact is,
6 if you ever had a record justifying prophylaxis
7 nationwide, the record here, that touches on 37
8 different States, that includes, in many cases,
9 statewide findings of constitutional violations, is it,
10 it's a record that justifies, certainly, some
11 prophylactic legislation; at least -- at the very
12 least, the minimal prophylaxis that we have in the ADA
13 in the prison setting. It's a kind of -- it's a kind
14 of prophylaxis that's very much like the kind of
15 prophylaxis this Court has previously upheld in
16 Tennessee v. Lane, where we had very similar
17 affirmative constitutional obligations, and in Nevada
18 v. Hibbs, where we had a much less significant record,
19 nationwide, of constitutional violations.

20 And so, for all those reasons, you know, we
21 believe that the ADA is congruent and proportional in
22 the prison setting.

23 And if the Court has no further questions --

24 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

25 MR. BAGENSTOS: Okay. Okay.

1 CHIEF JUSTICE ROBERTS: Mr. Castanias.

2 ORAL ARGUMENT OF GREGORY A. CASTANIAS

3 ON BEHALF OF RESPONDENTS

4 MR. CASTANIAS: Mr. Chief Justice, and may it
5 please the Court:

6 Before I sit down today, I'd like to make
7 three basic points, and hopefully I'll get to make --
8 elaborate on each of them a little bit.

9 First of all, this case is not anything like
10 Tennessee versus Lane. It doesn't involve the very
11 important civil right of access to courts, access to
12 voting booths, or anything like that. It involves --

13 JUSTICE BREYER: But was there -- there was a
14 reporter who was one of the disabled people, I think,
15 wasn't there, in Tennessee versus Lane?

16 MR. CASTANIAS: I believe that's correct --

17 JUSTICE BREYER: And so --

18 MR. CASTANIAS: -- Your Honor.

19 JUSTICE BREYER: -- what is the right that
20 that reporter has that's specific to courthouses?

21 MR. CASTANIAS: As I understand it, Your
22 Honor, from reading the opinion, that right was the
23 specific right to access the courts. It's the public
24 right of access to see court proceedings, like the
25 people --

1 JUSTICE BREYER: Well, was there any problem
2 of that in Tennessee versus Lane? I thought the
3 courthouse officials there said, "There'll be a trial.
4 No problem there, just whether you have to walk up the
5 steps or don't, and we'll give you a trial down below."
6 Was there -- it's the right of access to courthouse,
7 specially?

8 MR. CASTANIAS: It's the right of access to
9 courts, specifically, that was the context that was --
10 that was created for purpose of the as-applied analysis
11 in Lane.

12 The second point I hope I'll get to address
13 today is the very fundamental differences between the
14 prison context the -- and the courthouse context at
15 issue in Lane, and the reasons why the prison context
16 that it's -- that is at issue in this case makes this
17 case so fundamentally different. The prison context,
18 as Justice O'Connor pointed out, is one where issues of
19 safety and security and, as well, from the Court's
20 decisions, issues of federalism and deference to prison
21 officials hold sway. Those were not at issue in Lane,
22 and they --

23 CHIEF JUSTICE ROBERTS: Well, your --

24 MR. CASTANIAS: -- have a --

25 CHIEF JUSTICE ROBERTS: -- your friends on

1 the other side say that's not a big deal, because the
2 ADA looks only to reasonable accommodations; you can
3 take all those factors into account; and presumably the
4 lower courts would. In other words, they say you're
5 already subject to most of these obligations anyway,
6 and it's just a little bit extra, under the ADA.

7 MR. CASTANIAS: Well, Mr. Chief Justice, we
8 respectfully, but strenuously, disagree with that
9 submission, and I'll give you a very good example of
10 what they're not talking about here. What's happening
11 under the ADA, as a practical matter in the prison
12 context, is that it's giving prisoners trials on issues
13 like whether or not they have access to the television
14 room in the prison. That's not a constitutional right.
15 Before the ADA, that was never understood to be a
16 constitutional right.

17 JUSTICE GINSBURG: Have Courts of Appeals
18 approved those determinations?

19 MR. CASTANIAS: I'm not aware, Justice
20 Ginsburg, of any Court of Appeals that has ruled on
21 that yet, but I am aware of two District Court cases --
22 I could give you the names of them -- where summary
23 judgment was denied, and a trial was given to the
24 inmate. One is Brown against King County Department of
25 Adult Corrections --

1 JUSTICE GINSBURG: And how many has it -- in
2 the District Courts, how many have been rejected when
3 it's something like television or recreation?

4 MR. CASTANIAS: Justice Ginsburg, without
5 making any representations that I am going to canvas
6 the universe on this, I have not seen a case where the
7 District Court has rejected a trial in that respect.

8 And I think, Your Honor, this gives me an
9 opportunity to talk about one of the fundamental
10 problems --

11 JUSTICE GINSBURG: Well, before you do that -
12 -

13 MR. CASTANIAS: Sure.

14 JUSTICE GINSBURG: -- as I understand it, and
15 as the Solicitor General confirmed, you are subject to
16 the Rehabilitation Act, where the substantive scope is
17 the same. So, what -- you are saying, in the prison
18 context, this is undue, but you all -- you are already
19 subject to it under one Act. And how has that been
20 working out?

21 MR. CASTANIAS: Justice Ginsburg, I don't
22 have any data on that, and we haven't -- we don't have
23 any in our brief. The Solicitor General's data that he
24 put in on the Federal Bureau of Prisons came in his
25 reply brief, and we certainly haven't had --

1 JUSTICE O'CONNOR: But do you --

2 MR. CASTANIAS: -- an opportunity --

3 JUSTICE O'CONNOR: -- agree that --

4 MR. CASTANIAS: -- to pull that together.

5 JUSTICE O'CONNOR: -- the Rehab Act contains
6 the same essential requirements as ADA?

7 MR. CASTANIAS: Well, the Rehabilitation Act
8 is a little different than the ADA, but it certainly is
9 protective of many of the same rights. I would think
10 it would be protective of all of the same
11 constitutional rights that the --

12 JUSTICE O'CONNOR: And you agree that it
13 applies at least where the States are accepting Federal
14 money for the prison?

15 MR. CASTANIAS: Well, as I understand it,
16 Justice O'Connor, the Spending Clause power can be
17 hived down on a program-by-program basis, not just as
18 whether the State itself is receiving it. So, without
19 knowing specifically whether we're talking about the
20 particular program --

21 JUSTICE O'CONNOR: Does it apply in the
22 prison in this case -- the Rehab Act?

23 MR. CASTANIAS: I don't know the answer to
24 that, as I stand here, Justice O'Connor.

25 JUSTICE SCALIA: Mr. Schaerr, who's going to

1 be representing some States as amici, will presumably
2 have better information on that subject.

3 MR. CASTANIAS: I --

4 JUSTICE BREYER: In your point of view, would
5 it help if the Court said -- I guess it would, but I --
6 in order to get rid of this problem, if the Court said,
7 "Look, it says 'reasonable.' Of course prison has
8 special problems," and, referring, say, to Turner
9 versus Safley, said that, "These things about
10 television remote controls are not really, normally, a
11 matter of unreasonableness." So, in other words, we
12 hit -- we -- you give considerable discretion to the --
13 to the warden, and the Act would have bite in cases
14 where there is really a serious problem, like this one.
15 It's alleged to be a really serious problem.

16 MR. CASTANIAS: Well, Justice Breyer, I think
17 you're right to say that, except that that's not what
18 the Act says. The Act says --

19 JUSTICE BREYER: I thought it said
20 "reasonableness."

21 MR. CASTANIAS: That's exactly right, and
22 that -- and the reasonable -- the reasonable-
23 accommodation or reasonable-modification standard of
24 the ADA, both generally and specifically in Title II,
25 imposes an affirmative burden on the States, which is

1 very much unlike the rational-basis test of Cleburne.
2 It's very much unlike the rational-relationship test of
3 Turner against Safley. Quite the contrary, what
4 happens in these cases -- and this comes up in the
5 television cases, as well as the access-to-chapels
6 cases or any of the -- any of the cases that the
7 Petitioners have hypothesized -- what happens in that
8 case is, the Petitioner pleads that, "I could access
9 this if I only had a reasonable accommodation," and
10 then the burden shifts to the State, at that point, to
11 not just articulate reasonable grounds, but to, in
12 fact, prove that it is not reasonable or that it would
13 be an undue burden. There is a case that the -- that
14 Petitioner Goodman has cited in both of his briefs to
15 this Court, out of the Seventh Circuit, called Love
16 against Westville Correctional Facility -- comes out
17 Indiana -- and this case is a great example of why,
18 Justice Breyer, the Turner against -- the Turner
19 against Safley integration into the reasonableness
20 provisions of ADA Title II won't work, and isn't
21 congruent and proportional, because --

22 JUSTICE O'CONNOR: Is that case cited
23 somewhere?

24 MR. CASTANIAS: It is. It's in both the --
25 Petitioner Goodman's opening and reply briefs. In the

1 Love case -- and this is -- this is a law-school exam
2 case, because the prisoner put forth his case, and the
3 State of Indiana, while it was pre-Yeskey, nonetheless
4 agreed that the ADA applied to the prison and, at the
5 same time, didn't present any evidence. And the
6 prisoner won the case. And they won the case, because
7 all the State did is articulate reasons, like there was
8 -- it would cost too much. And this court very clearly
9 said, "Look, you didn't put any evidence. You lose."
10 Now, that's what -- that was one of the fundamental
11 factors that caused this Court to find, in both Kimel
12 and Garrett, the statutes unconstitutional, because the
13 --

14 JUSTICE GINSBURG: But maybe in the prison
15 setting, the lower courts would pay some attention to
16 the Court's recent decision in Cutter against
17 Wilkinson, where the Court made it very clear that a
18 high level of deference -- even dealing with a strict-
19 scrutiny standard for religious freedom -- that a high
20 level of deference would be paid to prison
21 administrators' judgment of what safety and discipline
22 requires inside a prison. Wouldn't that -- wouldn't
23 that carry over to the ADA, were it to apply?

24 MR. CASTANIAS: You --

25 JUSTICE SCALIA: We could say that --

1 MR. CASTANIAS: But you --

2 JUSTICE SCALIA: -- in this opinion. I mean,
3 that would make it happen, wouldn't it?

4 MR. CASTANIAS: You could -- I mean, you
5 could absolutely say it. You -- the Court can say
6 anything it wants here. But the problem is, is that
7 this was -- this was one of the fundamental problems
8 with ADA Title I --

9 JUSTICE GINSBURG: Do you think that the --

10 MR. CASTANIAS: -- and with the ADEA --

11 JUSTICE GINSBURG: -- that if the prison
12 explained what their practices were, in terms of the
13 needs of security, that a lower court will then say,
14 "Well, never mind that. The Supreme Court just said
15 it. We don't have to enforce it"? I don't think there
16 would be that kind of lawlessness.

17 MR. CASTANIAS: Well, I'm -- I -- Justice
18 Ginsburg, were -- if this Court were to uphold the
19 damages remedy in this case, this would be what the
20 States would be left to argue. And in -- while it is
21 true that you have said, in a couple of recent cases,
22 that strict scrutiny is not quite as fatal, in fact, as
23 usual, that strict-scrutiny case that you're referring
24 to is the true exception in the prison context, where
25 strict scrutiny was applied. And it involved the very

1 important, very core Fourteenth Amendment right against
2 racial discrimination.

3 Here, we're talking about a statute that was
4 framed by Congress as basically trying to change the
5 Cleburne rule, trying to bring an added level of
6 scrutiny to claims, equal-protection- --

7 JUSTICE GINSBURG: It's interesting --

8 MR. CASTANIAS: -- -type claims.

9 JUSTICE GINSBURG: -- that you cite that
10 case, in terms of Justice Scalia's remark, "Watch what
11 we do, not what we say." Cleburne was a remarkable
12 case in that respect. It purported to apply rational-
13 basis review, but the plaintiffs won.

14 MR. CASTANIAS: That's exactly right, Justice
15 Ginsburg. And, in fact, the reason that the plaintiffs
16 won is that the State, in that case, the State
17 defendants, offered four reasons, all of which were
18 found to be not legitimate State reasons. It was a
19 straightforward application of the rational- --

20 JUSTICE GINSBURG: But if you think --

21 MR. CASTANIAS: -- -basis test.

22 JUSTICE GINSBURG: -- if you think of the --
23 any conceivable basis -- doesn't even have to be
24 offered if the -- if it's, indeed, the rational-basis
25 test. It has been suggested that something more is

1 going on in Cleburne, and, I think, in all candor, one
2 would have to say so. Because if you looked at the
3 rational-basis test that had gone before, this one
4 looked no better, no worse.

5 MR. CASTANIAS: I think that the Tennessee
6 Solicitor General Moore, at the end of the Lane
7 argument, said, "We have to take the Court as -- for
8 what it does say." And it said it was applying
9 rational-basis scrutiny in that case.

10 JUSTICE SCALIA: Mr. Castanias, suppose the
11 Court agrees with you that the response here is not
12 proportionate, and, hence, that the prophylactic
13 aspects of this statute are invalid. There remains the
14 fact that the statute covers actual constitutional
15 violations for which you don't need any special
16 proportionality. Certainly, the Government can allow
17 the States to be sued for constitutional violations.
18 And the plaintiff here claims that some of the acts
19 he's seeking damages for do amount to constitutional
20 violations. How can we possibly say that that suit
21 does not lie?

22 MR. CASTANIAS: Well, I think, Your Honor,
23 there are two answers to that. First of all is,
24 Section 1983 already did that. And the reason that
25 that -- that may not --

1 JUSTICE SCALIA: It doesn't lie damages here.
2 Can you get damages under 1983?
3 MR. CASTANIAS: Absolutely.
4 JUSTICE SCALIA: Against the State?
5 MR. CASTANIAS: You can get it against State
6 officers acting --
7 JUSTICE SCALIA: State officers don't have
8 any money.
9 [Laughter.]
10 JUSTICE SCALIA: We're talking about damages
11 against the State.
12 MR. CASTANIAS: Well, you cannot get damages
13 against the State --
14 JUSTICE SCALIA: Under --
15 MR. CASTANIAS: -- under Section --
16 JUSTICE SCALIA: -- 1983 --
17 MR. CASTANIAS: -- 1983, that's --
18 JUSTICE SCALIA: -- absolutely.
19 MR. CASTANIAS: -- right. That is exactly
20 right. But the other answer, Justice Scalia, is that
21 to get to that result -- and I think it's remarkable
22 that both Petitioners' counsel stood up here, and the
23 way they framed the question was, "This is just
24 remedial for these actual constitutional violations in
25 prison." To get to that result, you would have to

1 rewrite the ADA in a way that would make the
2 reasonable-modification or reasonable-accommodate
3 provision basically an empty vessel to put whatever
4 constitutional law you want in --

5 JUSTICE SCALIA: No, no, I mean the portions
6 that go beyond constitutional violations are no good.
7 I'm not -- I'm not going to read it unrealistically so
8 that it only includes constitutional violations. But,
9 to the extent that it includes constitutional
10 violations, why isn't that lawsuit perfectly okay?

11 MR. CASTANIAS: Let me -- let me -- let me
12 pause for a second and think about that. The -- I
13 think the problem with that -- my instinct is that
14 there is a problem with that, and I think the problem
15 with that -- not just because, Your Honor, I represent
16 the State -- but I think the problem with that is that
17 it is, in no way, congruent to the constitutional
18 rights. In other words, what it's doing is, it's
19 giving, only to a limited class of prisoners, a
20 particular set of rights. In a way, this is the --
21 this is the underbreadth argument that we made in our
22 brief that the -- that the Petitioners, in their
23 replies, made fun of a little bit. But, quite
24 honestly, this is -- this -- it would be giving
25 disabled inmates -- making them into a special class

1 for purposes of constitutional violations that don't
2 apply just to disabled inmates at all. Quite the ---

3 JUSTICE BREYER: Well, that's --

4 MR. CASTANIAS: -- contrary --

5 JUSTICE BREYER: This is true. This is
6 exactly the point I had asked about before. This is a
7 better point. Because I thought that bridge was --
8 that -- was crossed in Lane. That is, I don't see how
9 you can say that Lane was not giving -- saying it's
10 constitutional to have prophylactic rules. And that's
11 why I raised the reporter. I've never heard of a First
12 Amendment right of a paper to send a particular
13 reporter. I mean, if there's a disabled reporter who
14 couldn't get into the courtroom, I guess they could
15 send a different reporter. Maybe that's a First
16 Amendment right, but I have not heard of it. So, I
17 thought that, really, Lane is saying, "You can sweep,
18 within the prophylactic rules, a lot of things that are
19 not, in fact, constitutional violations, but simply
20 discrimination against disabled people."

21 MR. CASTANIAS: I think, Justice Breyer, with
22 regard to Lane, the right that was at issue was not the
23 right of the paper to send a reporter, it was the right
24 of the reporter --

25 JUSTICE BREYER: I think there is a First

1 Amendment right for a newspaper, for example, to send a
2 particular reporter to the courtroom. That's an
3 interesting question. I never thought of that one. I
4 --

5 MR. CASTANIAS: No, actually, Justice --

6 JUSTICE BREYER: -- you don't think Lane
7 stands for the proposition of their prophylactic rules
8 being perfectly legitimate under the Eleventh
9 Amendment, where you have a set of constitutional
10 violations?

11 MR. CASTANIAS: Justice Breyer, I think -- I
12 think I either misstated my answer to you, because I
13 was trying to --

14 JUSTICE BREYER: No, I was asking --

15 MR. CASTANIAS: I --

16 JUSTICE BREYER: I'm --

17 MR. CASTANIAS: Let me try to answer that and
18 --

19 JUSTICE BREYER: Yes.

20 MR. CASTANIAS: -- say to you that I think,
21 first of all, the First Amendment right that was at
22 issue there was the general right that's possessed by
23 the public to attend court proceedings, not just a
24 right that was inherent in the newspaper or the -- a
25 right that was prophylactically being exercised there.

1 Justice Kennedy, you asked the Petitioner's
2 counsel about alternative remedies here, and I think
3 there's an important point to make with regard to Title
4 III of the ADA, and that's the title of the ADA that
5 applies, not to public entities, as we have here, like
6 the State prison, but the title that applies to public
7 accommodations, like restaurants and hotels. And it's
8 important to note, I think, that, in that title,
9 Congress did not provide for money-damages remedies.
10 Quite the contrary, it provided for an Attorney General
11 action, and it provided for injunctive relief. And so,
12 the notion that States somehow are special and should
13 be the ones that get damages against them for violating
14 the -- violating access rights is, in words that the
15 Court has used -- in Boerne and the cases following it,
16 that is a real indignity to the States. And, beyond
17 that, the standard that applies --

18 CHIEF JUSTICE ROBERTS: Well, presumably,
19 that's because the prisoners don't have a lot of choice
20 as to which accommodations they're going to select
21 from.

22 [Laughter.]

23 MR. CASTANIAS: I'm not sure, Mr. Chief
24 Justice, that it follows that damage -- that damages
25 follow from that observation. And I think, with regard

1 to the choices that are available to prisons, much has
2 been made in this case about the affirmative
3 obligations of the State to provide the minimum
4 standards of health and safety for prisoners. And I'd
5 point out that, in the Court's decision in DeShaney --
6 specifically, footnote 7 -- the former Chief Justice
7 wrote for the Court that, in determining both the scope
8 and how to satisfy those, there is an enormous amount
9 of discretion imposed in the State. So, it's hard to
10 say that that provision is allowing for -- that
11 minimal affirmative burden that's on the State is in
12 any way congruent with the broad affirmative remedies
13 that are at stake in this case.

14 Now, if I could just go through, very
15 quickly, the various constitutional rights that are
16 being addressed here by the -- that are being claimed
17 here by the Petitioner, you can see, in each case, why
18 it's not a proportional and congruent remedy to use
19 Title II of the ADA to enforce them.

20 First of all, with regard to the Equal
21 Protection Clause, it's almost obvious, from the
22 findings of Congress, that they meant to impose a
23 higher degree of scrutiny. By citing the words of
24 Carolene Products, as well as Matthews against Lucas,
25 that's -- have justified heightened scrutiny to apply

1 to the disabled, this is almost proof positive that
2 Title II -- and the ADA, in general -- is changing the
3 level of constitutional law. It's not enforcing; it's
4 changing the law.

5 JUSTICE SCALIA: Well, that just proves that
6 they went too far. It doesn't prove that, to the
7 extent that it covers a constitutional violation, it's
8 okay. We will say the excess is bad.

9 MR. CASTANIAS: Well, Justice Scalia, I think
10 the answer to that comes back to Kimel and Garrett.
11 The excessive change in the constitutional law was held
12 to have crossed the line in that case. And here, we
13 have the same problems. We have the changing of the
14 burdens. We have the changing of the level of
15 scrutiny. And we have the efforts, the same efforts
16 that were used in Kimel and Garrett --

17 JUSTICE STEVENS: Do you think --

18 MR. CASTANIAS: -- to make --

19 JUSTICE STEVENS: -- the level of scrutiny
20 applied in Cleburne was precisely the same rational-
21 basis level that is applied in a lot of other rational-
22 basis cases?

23 MR. CASTANIAS: I think it was, Justice
24 Stevens, because you can only talk about the
25 conceivable remedies in the context of what the State

1 puts forth. And perhaps a creative judge could say,
2 "Aha, but that's the State -- you didn't think about
3 this one." And the fact that Justice White's opinion -
4 - I think it was Justice White's opinion for the court
5 in Cleburne -- didn't go on and think about four other
6 conceivable bases, I don't think is a fault of the
7 decisionmaking process at all.

8 With regard to the Petitioner's efforts to
9 enforce the guarantee against cruel and unusual
10 punishment, there is no intent standard in the ADA at
11 all. In fact, this would scrub out the deliberate-
12 indifference standard entirely, and, in the -- at least
13 Goodman's reply brief, he admits that that basically
14 would be what would happen. He says that would be
15 appropriate prophylaxis. I think that is an
16 astonishing claim in this case.

17 JUSTICE GINSBURG: Can we go back, Mr.
18 Castanias, to Justice Scalia's question about the core
19 concerns? And we have been told by Respondents that
20 their core concerns are sanitation, mobility,
21 protection from physical injury. Now, that sounds to
22 me like constitutional Eighth Amendment heartland.

23 MR. CASTANIAS: And in that case, Justice
24 Ginsburg, if I could just briefly --

25 CHIEF JUSTICE ROBERTS: Sure.

1 MR. CASTANIAS: -- conclude? In that case,
2 Justice Ginsburg, the Constitution, through Section
3 1983, does provide a remedy. It will provide a remedy
4 that will get the prison to stop that.

5 If there are no other questions, we'd ask
6 that the judgment be affirmed.

7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 Mr. Schaerr, we'll hear now from you.

9 ORAL ARGUMENT OF GENE C. SCHAEER,
10 FOR AMICI CURIAE, TENNESSEE, ET AL.,

11 IN SUPPORT OF RESPONDENTS

12 MR. SCHAEER: Mr. Chief Justice, and may it
13 please the Court:

14 Let me begin by attempting to answer Justice
15 Scalia's questions -- question about the Rehabilitation
16 Act. My understanding is that the key difference
17 between the Rehabilitation Act and Title II is that --
18 is that the Rehabilitation Act requires intentional
19 conduct, which, obviously, is a much -- a much higher
20 standard.

21 Instead of dwelling on the record offered in
22 support of Title II -- and we agree with Georgia that
23 the record was not sufficient -- I'd like to focus on
24 the congruence and proportionality requirements, which
25 are quite separate from the record requirement, and

1 which we believe are independently dispositive in this
2 case, for two separate reasons.

3 But, first, I think it's important to recall
4 the two key purposes that the congruence-and-
5 proportionality analysis serves. One of those, as the
6 Court has reiterated, is to prevent Section 5 from
7 becoming a kind of police power through which Congress
8 can regulate the States and impose litigation and other
9 burdens on them as though they were mere corporations.

10

11 The second purpose, of course, is ensuring
12 that the specific remedies that Congress chooses, and
13 especially the abrogation of sovereign immunity --
14 sovereign immunity that this Court has held is within
15 Congress's Section 5 power, are a measured response to
16 Congress's legitimate goals. And that's obviously
17 important, because of the -- of the -- of the tension
18 between the Section 5 power, on the one hand, and the
19 Eleventh Amendment and other provisions of the
20 Constitution that protect --

21 JUSTICE STEVENS: May I just --

22 MR. SCHAERR: -- the State's sovereignty.

23 JUSTICE STEVENS: -- be sure I understand
24 this point?

25 MR. SCHAERR: Yes.

1 JUSTICE STEVENS: Are you, in fact, arguing
2 that the statute might be -- I know you don't agree
3 with it -- might be proportionate and congruent with
4 respect to all of its prohibitions, but, to the extent
5 it provides for a damage remedy, then it crosses the
6 line?

7 MR. SCHAERR: I do believe that the statute
8 could be invalidated on that ground alone, but I don't
9 think the Court needs to do that, because I think it's
10 clearly not congruent with constitutional requirements.

11 And let -- and I believe there are --

12 JUSTICE STEVENS: But --

13 MR. SCHAERR: -- four reasons for that.

14 JUSTICE STEVENS: But is that -- it --
15 because it has a damage remedy, or would it be equally
16 noncongruent without the damage remedy? That's what
17 I'm trying --

18 MR. SCHAERR: I --

19 JUSTICE STEVENS: I'm following up on Justice
20 Kennedy's question to your colleague.

21 MR. SCHAERR: Well, the way -- the way I
22 would view it is that the damage remedy is
23 disproportionate to Congress's legitimate goals in this
24 case, for a couple of reasons. Number one, as in -- as
25 in Florida Prepaid and some of this -- some of this

1 Court's other decisions, the abrogation of sovereign
2 immunity is not limited to the specific areas that
3 Congress and the courts have identified as the greatest
4 concern, from a constitutional standpoint. And, number
5 two, the abrogation of sovereign immunity is not
6 limited to the States, or categories of States, where
7 there has been a finding of unconstitutional action.
8 So, we do think that that would be a sufficient basis
9 to invalidate this statute's abrogation of sovereign
10 immunity, but we also think that the statute is not at
11 all congruent with the requirements of the
12 Constitution. And, as --

13 JUSTICE SOUTER: Mr. --

14 MR. SCHAEER: -- I said, I think there are
15 four reasons for that.

16 JUSTICE SOUTER: Mr. Schaerr, before you go
17 on, may I just ask you one question on the point that
18 you made -- and you made it in the brief -- about the
19 failure to establish a -- some kind of a history of
20 unconstitutional action in this particular State? Do I
21 understand you to claim that that is a -- that a record
22 of some sort must be made by Congress? Or can a record
23 of that sort be made in the courts, in the course of
24 litigation, as a predicate for a particular lawsuit
25 like this one?

1 MR. SCHAERR: Well, City of Boerne and other
2 courts -- other decisions of this Court say that, to be
3 a valid exercise of Congress's Section 5 authority, it
4 has to be a response to a record of constitutional
5 violations.

6 JUSTICE SOUTER: Right, but Congress --

7 MR. SCHAERR: And it's hard for me to --

8 JUSTICE SOUTER: -- but Congress normally
9 operates on a -- on a national scale --

10 MR. SCHAERR: True.

11 JUSTICE SOUTER: -- so that, I mean, we -- I
12 guess, we would normally say, "Well, you can show 40
13 States out of 50 were in trouble. That's probably good
14 enough to get you across the line, at least." But
15 you're not saying that. So, are you saying that
16 Congress has got to make the record with respect to
17 each individual State?

18 MR. SCHAERR: No, I'm not claiming that
19 Congress necessarily has to make the record, but I
20 believe the record has to have been created before
21 Congress acts; otherwise, the --

22 JUSTICE SOUTER: So, it could be done --

23 MR. SCHAERR: -- legislation isn't --

24 JUSTICE SOUTER: -- it could be done --

25 MR. SCHAERR: -- a response --

1 JUSTICE SOUTER: -- in the litigation of this
2 case, then. There could be a trial record of prior
3 violations.

4 MR. SCHAEER: No, I -- I don't think the
5 record in this case would satisfy it, because this --
6 because --

7 JUSTICE SOUTER: No, but my question is,
8 Where does the record have to be made? Does Congress
9 have to make it, on a State-by-State basis, or may that
10 record be made in the course of a trial in a particular
11 State as a predicate for subjecting that State to
12 liability in this instance?

13 MR. SCHAEER: Well, this Court's decisions
14 suggest that the record has to at least have been
15 within Congress's awareness at the time the statute was
16 passed.

17 JUSTICE SOUTER: So that Congress could have
18 known this, whether they specifically adverted to it,
19 or not. That would be sufficient.

20 MR. SCHAEER: I think that's correct.

21 Again, four reasons why Title II is not
22 congruent with the -- with the requirements of the
23 Constitution. First, as in Garrett, the substantive
24 accommodation duty imposed by Title II far exceeds the
25 requirements of the Constitution. And to see why, we

1 need look no further than Mr. Goodman's complaints that
2 are in the Joint Appendix, the Government's Addendum C,
3 and the Justice Department's implementing regulations,
4 which are found at 28 C.F.R. Section 35.130(b). And if
5 you -- if you look at Mr. Goodman's complaint, yes,
6 there are some allegations there that obviously raise
7 constitutional issues, but there are a lot of
8 allegations that clearly state a claim under the
9 Justice Department's interpretation of Title II, but,
10 equally clearly, don't raise constitutional issues.
11 For example, on page 65, he has a claim seeking to make
12 the TV lounge and other entertainment facilities
13 wheelchair accessible. Pages 53, 57, and 82, he makes
14 a claim for better access to recreation facilities,
15 rehabilitative exercises, and physical therapy. At
16 page 64 of the Joint Appendix, he makes a claim to
17 force the State to install wheelchair-accessible
18 bathrooms.

19 JUSTICE KENNEDY: And I'm saying this to help
20 you. I'd love to get reason 2. I'm wondering --

21 [Laughter.]

22 MR. SCHAEER: Okay.

23 JUSTICE SCALIA: Even if they're bad, why
24 aren't the other ones good?

25 MR. SCHAEER: Well, in order to abrogate the

1 State's sovereign immunity, there has to have been a
2 valid exercise of Congress's power, and there has to be
3 a statute that represents a valid exercise of that
4 power; otherwise, there's no basis for subjecting the
5 States to liability. So, I don't think it's enough
6 just to say, "Maybe there -- maybe there is an Eighth
7 Amendment claim here that's legitimate, and maybe,
8 therefore, in this case, the State's sovereign immunity
9 can be abrogated." It has to be done pursuant to a
10 legitimate exercise of Congress's power.

11 Reason number two, Justice Kennedy, is that,
12 as in Boerne and Garrett, even where constitutional
13 issues are implicated, Title II effectively imposes
14 heightened scrutiny on many decisions that are subject
15 to rational-basis review under the Constitution -- for
16 example, access to the law library, religious services,
17 associational rights, those sorts of things. And that,
18 I think, is the key distinction between this case and
19 Lane and Hibbs. And so, as the Court put it in
20 Garrett, even with the undue-burden exception, the
21 statute makes unlawful a range of alternative responses
22 that would be reasonable under the Constitution, but
23 would fall short of imposing an undue burden on the
24 employer.

25 Number three, as in Garrett, Title II

1 prohibits standards and criteria that have a disparate
2 impact on the disabled, even though that obviously
3 wouldn't be enough to establish a constitutional
4 violation if the disabled were a suspect class. And,
5 again, the Court need only look at the Justice
6 Department's regulations to see how they impose a
7 disparate-impact requirement.

8 And, fourth, again, as in Kimel and Garrett,
9 Title II reverses the burden of proof. As the Court
10 held in Garrett, under the Constitution,
11 classifications based on disability are prima facie --

12 JUSTICE BREYER: Well, why isn't all that
13 true of Lane? Everything you've said is also true of
14 the prophylactic part of Lane. I mean, I've never
15 heard that people took seriously -- though maybe they
16 should have -- but, before the ADA, I have never heard
17 there was a constitutional right of a disabled person
18 to go to a courthouse on the second floor. There were
19 second-floor courthouses all over the country. I don't
20 know that was true of the bathrooms. I don't know it
21 was true of a lot of things in courthouses. So, I
22 think your argument could be made in schools,
23 courthouses, all over the place. And I take it that
24 Lane said, "Prophylaxis" -- whatever the word is -- "of
25 that sort" --

1 [Laughter.]

2 JUSTICE BREYER: -- "is fine under Title II,
3 given a core of constitutional violations." So, how do
4 you distinguish them that?

5 MR. SCHAERR: Well, I think it -- one of the
6 ways is the one -- is the one I just mentioned a --
7 mentioned a minute ago. It's -- Lane was certainly
8 dealing with rights that have been considered by --

9 JUSTICE BREYER: You mean --

10 MR. SCHAERR: -- the Court --

11 JUSTICE BREYER: -- beyond a --

12 MR. SCHAERR: -- to be --

13 JUSTICE BREYER: -- the average public, you
14 had a constitutional right? I mean, you might have. I
15 might be surprised. But, interesting.

16 MR. SCHAERR: Well, I --

17 JUSTICE BREYER: The average person could
18 have brought a lawsuit, a person in a wheelchair, and
19 said, "All the courthouses in this country, or in this
20 county, are on the second floor, and moreover the
21 bathrooms -- I need a special bathroom," and they would
22 have won without the ADA. Why did we need the ADA,
23 then?

24 MR. SCHAERR: Well, I'm not sure the claim --
25 I'm not sure, Justice Breyer, that the claim of the

1 person who wanted access to the courthouse to serve as
2 a reporter was necessary to the result in Lane in all
3 of that.

4 JUSTICE BREYER: Ah. Ah, you're saying -- I
5 -- what I just heard was, it's -- the reporter just was
6 a stand-in for the average person, that the average
7 person had these constitutional rights, which may have
8 been a --

9 MR. SCHAERR: I think that would be one way
10 of understanding it, though not the only way.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Mr.
13 Schaerr.

14 General Clement, you have four minutes
15 remaining.

16 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
17 ON BEHALF OF THE PETITIONER IN 04-1203

18 GENERAL CLEMENT: Thank you, Mr. Chief
19 Justice.

20 Before I say anything else, I want to just
21 clarify that the scope of the Rehab Act and Title II is
22 really coextensive. Mr. Schaerr made a reference to
23 the fact that you need intentional conduct under the
24 Rehab Act. I think that was true for a while in the
25 lower courts with respect to damages claims. I think

1 after this Court's decision in Gebser, in the context
2 of damages claims, the lower courts have generally
3 required deliberate indifference both in the
4 Rehabilitation Act context and in the Title II Act
5 context, to the extent they've reached the issue. But
6 with respect to the substantive obligations, they
7 really are identical. And I do think that's important,
8 in a couple of ways.

9 In particular, I think it's worth remembering
10 here that the damages remedy in Title II -- and this is
11 different than Title I, where there was a specific
12 provision for back-pay -- but in Title II, the damages
13 remedy is just an incorporation of the damages remedy
14 available under the Rehab Act, which, in turn,
15 incorporates Title VI and Title IX remedies. And
16 those, of course, are entirely judge-made.

17 And so, one of the things this Court
18 recognized in Gebser, in deciding there had to be
19 deliberate indifference for a compensatory-damages
20 claim, is, this Court said, the judge-made nature of
21 those remedies gives the court a particularly free hand
22 in making those remedies make sense, in terms of the
23 statute, and, I would think, a fortiori, in terms of
24 the Constitution. So, if --

25 CHIEF JUSTICE ROBERTS: General, when you --

1 earlier, you told us that this doesn't add much to the
2 Constitution, in Turner versus Safley, and then we hear
3 about access to the TV lounge, which doesn't sound like
4 a constitutional deliberate-indifference Eighth
5 Amendment claim. I mean, if it's important to us how
6 much of this applies, how do we address that issue?

7 GENERAL CLEMENT: Well, let me address the
8 specter of all these claims for TV access, because I do
9 think that that's something that can be taken care of
10 in any number of respects. One is, a sensible
11 application of Turner-type principles to the
12 reasonable-modification standard can certainly be done
13 in a way to weed out those claims. I also think --
14 especially given Justice Kennedy's principal concern
15 with damages, I think here's an area where the PLRA is
16 particularly helpful, because I don't know what kind of
17 physical injury you're going to be able to show to
18 being denied access to the TV room. And since that's
19 what you need to show under the PLRA in order to
20 recover any damages for mental and emotional suffering
21 that I suppose you could try to bring a claim for
22 emotional suffering for not seeing TV -- I'm not sure
23 which way that would cut -- but, in any event --

24 [Laughter.]

25 GENERAL CLEMENT: -- I think, in those

1 contexts, the PLRA is the gateway you need to some
2 physical injury, so I think that's going to help weed
3 these out as a matter of damages claims. And so, I
4 think that's going to have a helpfulness, too.

5 Also, I think, in some -- in some sense, you
6 can't lose sight of the fact that perhaps the reason
7 that somebody's being denied access to the TV room is
8 because they're in a wheelchair on the second floor,
9 and the TV room and the law library and the religious
10 services and everything else they need in the prison is
11 on the first floor. And, in those contexts, it may be
12 an appropriate degree of prophylaxis.

13 But I guess what I would say is, I would
14 think that this Court would want to interpret the PL- -
15 - I'm sorry, would want to interpret Title II in a way
16 that avoids constitutional problems, rather than in a
17 way that engenders it. And so, to the extent the
18 access to the TV room is critical to the
19 constitutionality of the statute, I think the
20 reasonable-modification standard provides plenty of
21 tools to apply Turner-type principles and ameliorate
22 the constitutional problems.

23 I mean, if you compared this case with Cutter
24 against Wilkinson from last term, there you had a
25 statutory strict-scrutiny standard that was

1 specifically directed at the prisons in one other
2 context. And, nonetheless, this Court said, "That can
3 be applied with Turner deference-type principles."

4 Here, you have a statute that applies
5 broadly, and I would think it would be a very easy act
6 of interpretation and constitutional avoidance to say
7 that, "In the prison context, we're going to interpret
8 in a way that avoids constitutional difficulties."

9 If I could try to address just one or two
10 specific questions -- Justice Souter, you asked about
11 the practical experience of the Federal Government.
12 And, as we point out in our opening brief, at page 45,
13 it's been less than 1 percent of our litigation, and
14 less than 2 percent of our compliance cost.

15 Thank you, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Thank you, General.

17 The case is submitted.

18 [Whereupon, at 11:01 a.m., the case in the
19 above-entitled matter was submitted.]

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22